



4310-05-P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 946

[VA-126-FOR; OSM-2008-0012]

#### Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving an amendment to the Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendment revises the Virginia Coal Surface Mining Reclamation Regulations pertaining to ownership and control, valid existing rights, self-bonding, and availability of records. Virginia intends to revise its program to be consistent with the corresponding Federal regulations and SMCRA and is responding, in part, to a 30 CFR Part 732 letter.

DATES: Effective [Insert date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Mr. Earl Bandy, Director,  
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SUPPLEMENTARY INFORMATION:

- I. Background on the Virginia Program
- II. Submission of the Amendment
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I. Background on the Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "...a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act...; and rules and regulations consistent with regulations issued by the Secretary pursuant to the

Act.” 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Virginia program on December 15, 1981. You can find background information on the Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Virginia program in the December 15, 1981, Federal Register (46 FR 61088). You can also find later actions concerning Virginia’s program and program amendments at 30 CFR 946.12, 946.13, and 946.15.

## II. Submission of the Amendment

By letter dated June 11, 2008, the Virginia Department of Mines, Minerals, and Energy (Virginia) sent us an informal proposed amendment to its program for a pre-submission review (VA-126-INF). We reviewed the pre-submission and responded to Virginia, with comments, via electronic mail on July 2, 2008. By letter dated July 17, 2008, Virginia formally submitted the proposed amendments to its program (Administrative Record No. VA-1089).

We announced receipt of the proposed amendment in the August 29, 2008, Federal Register (73 FR 50915). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment’s adequacy. We did not hold a public hearing or meeting because no one requested one. The public comment period ended on September 29, 2008. No comments were received.

OSM's review of the July 17, 2008, submittal identified several issues that we presented to Virginia. The first discussion occurred by telephone on September 4, 2008. As a result of that discussion, Virginia submitted on the same date, via electronic mail, Memorandum #13-86 which specifies application processing time limits for new permits and revision applications (Administrative Record No. VA-1093). The complete text of the Memorandum can be found at <http://www.Virginia.virginia.gov/DMLR/docs/operatormemos>. A subsequent meeting was held on October 16, 2008 (Administrative Record No. VA-1099). In an electronic mail message dated October 29, 2008 (Administrative Record No. VA-2000), Virginia provided its position in response to OSM's comments and agreed to expeditiously submit additional changes. On November 3, 2008, Virginia responded by submitting regulation changes via electronic mail (Administrative Record No. VA-2001). OSM provided additional comments on the regulation changes on November 13, 2008 (Administrative Record No. VA-2002), and Virginia responded to these comments on November 20, 2008, by electronic mail (Administrative Record No. VA-2003). We announced receipt of the additional revisions in the April 17, 2009, Federal Register (74 FR 17806). The public comment period ended on May 4, 2009. Public comments were filed jointly by the Southern Appalachian Mountain Stewards (SAMS) and the Sierra Club. These comments have been addressed at the section titled SUMMARY AND DISPOSITION OF COMMENTS.

On March 25, 2011, OSM sent a letter (Administrative Record No. VA-2007) to

Virginia informing them that their provisions at 4 VAC25-130-761.16(d)(1)(vii) and 4VAC25-130-761.16(d)(3), were inconsistent with the Federal counterparts. The language proposed by Virginia would have required that an applicant provide reasons for requesting an initial 30 day extension to the comment period.

The federal counterpart provisions, at 30 CFR 761.16(d)(1)(vii) and 761.16(d)(3), are clear that the initial 30-day extension will be granted, without cause, upon request.

Subsequent to several extensions (Administrative Record numbers VA-2008, VA-2009, VA-2010), Virginia submitted, by electronic mail, on June 13, 2011 (Administrative Record No. VA-2012), revised language that is substantially identical to the corresponding federal counterparts.

### III. OSM's Findings

The following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment. Any revisions that we do not specifically discuss below concern non-substantive wording or editorial changes.

#### a. Minor Revisions to Virginia's Rules

Virginia proposed minor wording changes to the following previously-

approved rules:

<u>State Regulation</u>	<u>Federal Regulation</u>	<u>Topic</u>
4VAC25-130-773.13	30 CFR 773.6	Public Participation
4VAC25-130-773.20(a)	30 CFR 773.21(a)	Improvidently Issued Permits, General Procedures
4VAC25-130-774.12(e)	30 CFR 774.11	Post-Permit Issuance Requirements
4VAC25-130-774.17(a)	30 CFR 774.17	Transfer, Assignment, or Sale of Permit Rights
4VAC25-130-778.13 (c), (d), (k),(m)	30 CFR 778.11	Identification of Interests
4 VAC25-130-801.13 (a)(3), (a)(7), (b)	None	Self-bonding

Because these changes are minor, we find that they will not make Virginia's regulations less effective than the corresponding Federal regulations and can be approved.

b. Revisions to Virginia's Rules That Are Substantively Identical to, and Therefore no Less Effective than, the Corresponding Provisions of the Federal Regulations.

<u>State Regulation</u>	<u>Federal Regulation</u>	<u>Topic</u>
4VAC25-130-700.5	30 CFR 701.5	Definition of <i>Applicant Violator</i> <i>System</i> or <i>AVS</i> ; <i>Control</i> or <i>Controller</i> ; <i>Knowing</i> or <i>knowingly</i> ; <i>Own</i> , <i>Owner</i> , or <i>Ownership</i> ;
4VAC25-130-700.5.	30 CFR 800.5	Definitions <i>Self- Bond</i>
4VAC25-130-700.5	30 CFR 701.5	Definitions of <i>Transfer</i> , <i>Assignment</i> , or <i>Sale of Permit</i> <i>Rights</i> ; <i>Violation</i> ; <i>Violation</i> , <i>Failure</i> , or <i>Refusal</i> ; <i>Violation Notice</i> ; <i>Willful</i> or <i>Willfully</i> ;

4VAC25-130-700.5	30 CFR 761.5	Definition of <i>Valid Existing Rights</i>
4VAC25-130-761.11	30 CFR 761.11	Areas Where Mining is Prohibited or Limited
4VAC25-130-761.13	30 CFR 761.12(a)	Exception for Existing Operations
4VAC25-130-761.16(a), (b)(1)-(4), (c), (d)(1)(i)-(viii) (d)(2),(3), (e), (f), and (g)	30 CFR 761.16	Submission and Processing of Requests for Valid Existing Rights Determinations
4VAC25-130-772.12(b)(14) and (d)(2)(iv)	30 CFR 772.12(b)(14) and (d)(2)(iv)	Permit Requirements for Exploration Removing More Than 250 Tons of Coal or Occurring on Lands Designated as Unsuitable for Surface Coal Mining Operations
4VAC25-130-773.15(b)(1)	30 CFR 773.7	Review of Permit Applications
4VAC25-130-773.20(c)(3)	30 CFR 773.21(c)	Improvidently Issued Permits: General Procedures



4VAC25-130-774.12(a), (d), (e)	30 CFR 774.11(a),(b)	Post-Permit Issuance Requirements
4VAC25-130-774.17(a)	30 CFR 774.17(a)	Transfer, Assignment, or Sale of Permit Rights
4VAC25-130-778.13(a)-(e)	30 CFR 778.11(a)-(d)	Identification of Interests
4VAC25-130-778.14(c)	30 CFR 778.14(c)	Violation Information

Because the proposed rules contain language that is substantively identical to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations and can be approved.

c. Revisions to Virginia’s Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

1. At 4VAC25-130-773.15 – Review of Permit Applications:
  - a) At subsection (a)(1) Virginia proposes to require that the Division review the application for a permit, revision, or renewal; written comments and objections; information from AVS; and records of any informal conference or hearing held on the application - and issue a written decision, within a reasonable time, either granting, requiring modification of, or denying the application. If an informal conference is held, the decision will be made

within 60 days of the close of the conference.

The Federal regulations at 30 CFR 773.7(a) require that the regulatory authority must specify a reasonable time (set by the regulatory authority) for decisions in those cases where no informal conference has been requested. Virginia's Memorandum to Operators #13-86 (Administrative Record No. VA-1093) provides time limits for permit and revision applications, but does not specifically address renewal applications.

By electronic mail on November 20, 2008 (Administrative Record No. VA-2003), Virginia clarified its permit renewal review process. It stated in part, "A permit renewal is different than a new permit or revision application, in that there is a set date in which it must be submitted to the Division ... at least 120 days before the existing permit's expiration date. Failure to do so would subject the operation to cessation of mining operations on the expiration date if a renewal application was not timely submitted and the permittee was not acting diligently and in good faith with regard to the permit application. For timely submitted applications, the Division's decision on the renewal application is, for the most part, rendered by the existing permit's expiration date."

In effect, Virginia must render a decision on a permit renewal application by the expiration date of the existing permit. Virginia requires that a renewal

application be submitted 120 days prior to the expiration of the existing permit to accommodate the required filing and public notice procedures. Therefore, the time period for decisions is the aforementioned 120-day application timeframe. For these reasons, we find that the proposed revisions are no less effective than the corresponding Federal regulations at 30 CFR 773.7(a) and can be approved.

b) At subsection (b)(4)(i)(C), Virginia proposes to revise its violation review procedures to delete the remaining exclusion for those permits, or renewals, issued before September, 2004. We find that these revisions are no less stringent than the provisions of section 510(e) of SMCRA, as modified by the Tax Relief and Health Care Act of 2006, which address permit approval or denial and therefore can be approved.

2. At 4VAC25-130-773.21 - Improvidently Issued Permits; Rescission, Virginia proposes to make the requirements of this section applicable to permit suspensions, as well as permit rescissions. Virginia is also requiring that the notice of permit suspension or rescission be posted at its offices and on its internet home page. It also provides the procedures for the challenge and review of a person's ownership and control listing. Additionally, if a permittee files for an administrative review of the notice or decision pertaining to ownership and control, Virginia is requiring that the notice of public hearing be posted at the division office located nearest to the permit.

We find that the proposed revisions are no less effective than the Federal regulations at 30 CFR 773.23(a)-(d), which address the administrative review and notification requirements for the suspension or rescission of improvidently issued permits, and can be approved.

3. At 4VAC25-130-840.14(c)(2) – Availability of Records, Virginia proposes to post a notice that specifies how and where it will maintain records pertaining to records, reports, inspection materials, permit applications, and other information for public inspection and copying. The notice will be sent to Circuit Court Clerks of coal-producing counties and will be posted at all Virginia Division of Mined Land Reclamation offices. Virginia will maintain the records at its principal office and the information will also be made available, upon request, at its field office as well as any Federal, State, or local government office(s) located in the county where the mining is, or may be proposed to occur.

Virginia is complying with the Federal regulations at 30 CFR 840.14(b) and (c) that require that all pertinent permit information be made available for public inspection by either maintaining said information at Federal, State, or local government offices in the county where mining is occurring or proposed to occur, or mailing or electronically mailing said information to a requestor based on a description maintained at the locations named above. We find that

the proposed revisions are no less effective than the Federal regulations at 30 CFR 840.14(b) and (c) and therefore can be approved.

d. Revisions to Virginia's Rules With No Corresponding Federal Regulations

1. At 4 VAC 25-130-700.5 – Definitions, Virginia proposes to delete the term and definition of *Cognovit Note*. It is replaced by *Indemnity Agreement* in 4 VAC25-130-801.13. There is no Federal counterpart to either the definition of *Cognovit Note* or *Indemnity Agreement*. However, the term *Indemnity Agreement* is used in the definitions of *Surety Bond*, *Collateral Bond*, and *Self-Bond*, in 30 CFR 800.5, whereas the term *Cognovit Note* does not appear in the Federal regulations. Moreover, the term *Indemnity Agreement* is defined in a manner that is consistent with its usage in the aforementioned Federal regulatory definitions. Therefore, we find that these changes are not inconsistent with the requirements of SMCRA and the Federal regulations and can be approved.
2. At 4 VAC25-130-773.15(a)(3)-(4) – Review of Permit Applications, Virginia proposes to require its review of information regarding the permit applicant's and/or operator's permit histories, business structure, and ownership and control relationships. Virginia may also conduct other ownership and control reviews, as necessary, in those cases where the applicant has no previous mining history. While there is no direct Federal counterpart to the proposed

revisions, we find that the revisions are consistent with the general Federal provisions pertaining to permit application review at 30 CFR 773.7 and therefore can be approved.

3. At 4 VAC25-130-774.12(b), (c) – Post-Permit Issuance Requirements,  
Virginia proposes to specify the permittee’s required actions in the event: 1) said permittee fails to comply with the remedial measures of an enforcement action, or 2) the identification of interests information in the permit application changes. While there is no direct Federal counterpart to the proposed revisions, we find that the revisions are consistent with the general Federal provisions pertaining to post-permit issuance at 30 CFR 774.11 and therefore can be approved.
4. At 4 VAC25-130-778.13(e),(f),(g) – Identification of Interests:
  - a) At subsection (e), Virginia proposes to require that a permit application include a list of all names under which the applicants *et al* operate or previously operated a surface coal mining operation within a 5-year period preceding the submission date of the application.
  - b) At subsection (f), Virginia proposes to require that a permit application include a list of any pending permit applications with identifying information for the applicant and operator (if different from the applicant).
  - c) At subsection (g), Virginia proposes to require that a permit application

include certain identifying information for the permittee and operator.

This includes name, address, tax identification numbers, permits numbers, and ownership relationship.

While there are no direct Federal counterparts to the proposed revisions, we find that the revisions are consistent with the general Federal provisions pertaining to permit application review at 30 CFR 778.11 and therefore can be approved.

5. At 4 VAC 25-130-800.52 – Bond Forfeiture Reinstatement Procedures:
  - a) Subsection (a), Virginia proposes to delete the reference to the Board of Conservation and Economic Development, as the entity no longer exists.
  - b) Subsection (a)(5), Virginia proposes to replace the term *civil penalty* with *reinstatement fee*. This revision will differentiate the fee from the civil penalty that may be assessed under 4 VAC25-130-845. Virginia also proposes to allow the use of the reinstatement fees for other investigations, research, or abatement actions relating to lands and waters affected by coal surface mining activities.

There are no Federal counterpart regulations. We find that the revisions are not inconsistent with the requirements of SMCRA and the Federal regulations and can be approved.

6. At 4 VAC 25-130-801.12(d) – Entrance Fee and Bond, Virginia proposes to require the annual certification of the financial solvency of a permittee during the term of the permit. There is no Federal counterpart regulation. We find that the revision is not inconsistent with the requirements of SMCRA and the Federal regulations and can be approved.
7. At 4 VAC 25-130-801.13 – Self-Bonding:
  - a) Subsection (a), Virginia proposes to allow self-bonds from applicants of proposed surface coal mining operations in the form of an indemnity agreement. Virginia also proposes to change “paragraph” to “subdivision” in subsections (a)(3), (a)(7), and (b).
  - b) Subsection (a)(1)(iv), Virginia proposes to require that an applicant of a proposed surface coal mining operation provide evidence indicating a history of satisfactory continuous operation.
  - c) Subsection (a)(3), Virginia proposes to require that an applicant of a proposed surface mining operation or associated facility submit evidence substantiating the applicant’s financial solvency, with appropriate financial documentation.
  - d) Virginia proposes to replace *cognovits note* with *indemnity agreement (agreement)* throughout the section.
  - e) Virginia proposes to delete existing subsection (b) pertaining to self-bonding provisions for surface coal mining operations. The surface coal



mining permit requirements for self-bonding are addressed in subsection (a).

While there are no direct Federal counterparts to the proposed revisions, we find that the revisions are consistent with the general Federal provisions pertaining to self-bonding at 30 CFR 800.23 and therefore can be approved.

#### IV. Summary and Disposition of Comments

##### Public Comments

We asked for public comments on the amendment (Administrative Record No. VA-1090). The Virginia Department of Historic Resources commented that no historic properties will be affected by the provisions of the proposed amendment (Administrative Record No. VA-1095). We received several comments filed jointly by the Southern Appalachian Mountain Stewards (SAMS) and the Sierra Club (Administrative Record No. VA-2006). Responses to those comments follow. The joint commenters are referred to as “SAMS/Sierra Club” or “the commenters.”

SAMS/Sierra Club contend that OSM must disapprove the portion of the amendment that, according to them, “would effectively require any person who disputes the property rights assertion at the root of a [valid existing rights] VER claim either to commence litigation against the permit applicant prior to the expiration of the

comment period on the VER request or else allow [the Virginia Department of Mines, Minerals & Energy] DMME to ‘evaluate the merits of the information in the record’ with respect to disputed property rights and then to ‘determine whether the [permit applicant] has demonstrated that the requisite property rights exist.’” The Virginia proposed provision SAMS/Sierra Club refer to is at 4 VAC 25-130-130-761.16(e)(3). They argue that this provision is “fundamentally flawed in at least two respects.”

*SAMS/Sierra Club Comment #1:* First, SAMS/Sierra Club state that the amendment would unlawfully shift the burden of commencing property rights dispute litigation to persons who oppose approval of the permit application, rather than placing the burden on the permit applicant, which, according to SAMS/Sierra Club, is mandated by SMCRA at 30 U.S.C. 1260(a). This statutory provision states that “[t]he applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program.” Thus, according to the commenters, a permit applicant must seek judicial resolution of a property rights dispute in order to satisfy the property rights component of a VER determination; SMCRA does not, they contend, allow a State regulatory authority to undertake such an adjudication. For these reasons, SAMS/Sierra Club insist that OSM is required, pursuant to 30 CFR 732.17(h)(10), to disapprove 4 VAC 25-130-130-761.16(e)(3)(i) and clarify that “federal law does not permit DMME to adopt any regulation that would relieve permit applicants of the obligation to obtain a valid adjudication of any property rights dispute pertinent to the ‘right to mine’ demonstration that each permit applicant must make, including any claim to VER that may be a part of the applicant’s ‘right to mine’ demonstration.

Permit applicants must commence and complete such proceedings in order to submit a complete application; state regulatory authorities may not shift that burden to persons who dispute the applicant's right to mine, including any property-rights based claim to VER that an applicant may make."

*OSM's Response:* We disagree with SAMS/Sierra Club. The Virginia provision is identical in substance to the counterpart Federal regulation at 30 CFR 761.16(e)(3)(i), which states as follows:

The agency must issue a determination that you have not demonstrated valid existing rights if your property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. The agency will make this determination without prejudice, meaning that you may refile the request once the property rights dispute is finally adjudicated. This paragraph applies only to situations in which legal action has been initiated as of the closing date of the comment period under paragraph (d)(1) or (d)(3) of this section.

The VER regulations published by OSM on December 17, 1999 (64 FR 70766-70838), which include the provision quoted above, were challenged by the National Mining Association and upheld by the United States Court of Appeals for the District of Columbia Circuit in Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702 (D. C. Cir. 2008), cert. denied 172 L. Ed. 2d 639 (U.S. Dec. 1, 2008). Thus, as noted in Finding III(b) above, the Virginia provision at 4 VAC 25-130-130-761.16(e)(3)(i) is substantively identical to, and no less effective than, its Federal counterpart, and is therefore approved.

*SAMS/Sierra Club Comment #2:* Second, the commenters assert that the Virginia regulation at 4 VAC 25-130-130-761.16(e)(3)(ii), which would permit the DMME “to evaluate the merits of the information in the record and determine whether the person has demonstrated that the requisite property rights exist under subdivision (a), (c)(1), or (c)(2) of the valid existing rights definition . . . , as appropriate,” is “flatly inconsistent with SMCRA’s dictate that ‘nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.’ 30 U.S.C. 1260(b)(6). Instead, SAMS/Sierra Club argues, SMCRA requires the regulatory authority to “withhold approval of the pertinent permit application unless and until the permit applicant obtains a favorable adjudication of that dispute in accordance with pertinent state law[.]” For this reason, they contend, the DMME may not “evaluate the merits of information in the record” to “determine whether the [permit applicant] has demonstrated that requisite property rights exist, as provided for in paragraph (e)(3)(ii), because to do so would “constitute an administrative adjudication of property rights that SMCRA flatly prohibits a regulatory authority from undertaking.” Therefore, the commenters conclude, OSM must disapprove 4 VAC 25-130-130-761.16(e)(3)(ii), and “make clear that federal law does not permit DMME to adopt any regulation that would empower it to adjudicate any property rights dispute pertinent to any of its activities under the approved Virginia state program.”

*OSM’s Response:* We disagree with SAMS/Sierra Club, based precisely on the rationale set forth in our response to SAMS/Sierra Club Comment #1, above. The

Virginia provision is substantively identical to, and therefore no less effective than, its Federal counterpart addressing valid existing rights claims at 30 CFR 761.16(e)(3)(ii), which states:

If the record indicates disagreement as to the accuracy of your property rights claims, but this disagreement is not the subject of pending litigation in a court or administrative agency of competent jurisdiction, the agency must evaluate the merits of the information in the record and determine whether you have demonstrated that the requisite property rights exist under paragraph (a), (c)(1), or (c)(2) of the definition of valid existing rights in § 761.5, as appropriate. The agency must then proceed with the decision process under paragraph (e)(2) of this section.

This Federal provision was part of the same VER challenge that resulted in the upholding of all of the Federal VER regulations promulgated by OSM on December 17, 1999 (64 FR 70766-70838). Nat'l Mining Ass'n v. Kempthorne, *supra*. The Federal regulation provides, if there is no pending litigation in a court or administrative agency of competent jurisdiction on the question of property rights, the regulatory agency must evaluate the merits of the information submitted and determine if the applicable regulatory provisions for demonstrating requisite property rights under the definition of valid existing rights have been satisfied. As indicated, the Virginia provision is substantively identical to the Federal provision. For these reasons, we approve the Virginia regulation at 4 VAC 25 130 130 761.16 (e) (3)(ii).

*SAMS/Sierra Club Comment #3*: The commenters also objected to the comment period provided for by 4 VAC 25-130-761.16(d)(3). The commenters contend that the 30 day comment period for a VER determination, which may be expanded to 60 days at the DMME's discretion, "establishes an unreasonably brief period within

which coalfield citizens who wish to challenge a VER claim must commence litigation to resolve an underlying property rights dispute,” as set forth in 4 VAC 25-130-130-761.16(e)(3)(ii). The comment period would, according to SAMS/Sierra Club, “have the effect of limiting citizen access to necessary legal services, or even foreclosing such access altogether, due to the likely refusal of attorneys to accept matters on such an emergency footing [.]” Thus, according to the commenters, even if it were lawful to require citizens to commence property rights dispute litigation (which the commenters say is certainly not the case), “OSM’s duty to foster participation in the Virginia program would require . . . [it] to withhold approval of DMME’s proposed permit amendment unless and until DMME provides at least a 90-day public comment period . . . , together with provision for mandatory extension . . . for an additional 30 days if an attorney representing a person who intends to file a property rights dispute establishes a good faith need for additional time to prepare and file litigation.”

*OSM’s Response:* SAMS/Sierra Club provides no rationale for requiring DMME to establish a minimum comment period of 90 days for a VER determination, with a mandatory 30 day extension based upon a good faith need for more time by an attorney representing the would-be plaintiff in a property rights dispute. Indeed, the Federal regulation at 30 CFR 761.16(d)(3), which is now settled law, establishes a 30 day period, with an additional 30 days upon request, followed by the possibility of further extensions at the discretion of the regulatory authority, based upon a showing of good cause by the requestor; it does not, however, mandate a comment period

longer than 60 days, as requested by SAMS/Sierra Club. Therefore, we disagree with the commenters that Virginia must provide a longer comment period than is allowed under the Federal regulatory counterpart.

*SAMS/Sierra Club Comment #4:* Finally, the commenters request that, if it has not done so, OSM must submit the proposed amendment to Virginia's State Historic Preservation Officer (SHPO) and to the Advisory Council on Historic Preservation (ACHP) for comment, pursuant to 30 CFR 732.17(h)(4).

*OSM's Response:* We sent letters to both the Virginia SHPO and the ACHP on August 12, 2008 (Administrative Record No. VA-1090). By letter dated September 9, 2008, the SHPO notified us that no impacts to historic properties were anticipated if we were to approve this amendment (Administrative Record No. VA-1095).

#### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on August 12, 2008, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the Virginia program (Administrative Record No. VA-1090). The United States Department of the Interior, Bureau of Land Management responded and stated that they found no inconsistencies with the proposed changes and the Federal Laws, which govern mining (Administrative Record No. 1067). The United States Department of Agriculture, Natural Resources Conservation Services

responded and stated that they did not object to the amendment and deemed the changes appropriate.

#### Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from the EPA (Administrative Record No. VA-1090). No comments were received.

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 et seq.) or the Clean Air Act (42 U.S.C. 7401 et seq.). None of the revisions that Virginia proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

#### V. OSM's Decision

Based on the above findings, we are approving the amendment sent to us by Virginia on July 17, 2008. To implement this decision, we are amending the Federal regulations at 30 CFR Part 946, which codify decisions concerning the Virginia program. Pursuant to 5 U.S.C. 553(d)(3), an agency may, upon a showing of good cause, waive the 30 day delay of the effective date of a substantive rule following publication in the Federal Register, thereby making the final rule effective immediately.



We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Because Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes, making this regulation effective immediately will expedite that process.

## VI. Procedural Determinations

### Executive Order 12630 – Takings

The provisions in the rule based on counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

### Executive Order 12866 - Regulatory Planning and Review

This rule is exempt from review by the Office of Management and Budget under Executive Order 12866.

### Executive Order 12988 - Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

### Executive Order 13132 - Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance

with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

#### Executive Order 13175 – Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve Federal regulations involving Indian lands.

#### Executive Order 13211 - Regulations That Significantly Affect The Supply, Distribution, Or Use Of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse

effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

#### National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

#### Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 et seq.).

#### Regulatory Flexibility Act

The Department of the Interior certifies that the provisions in this rule that are based on counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This determination is based on an analysis prepared for the counterpart Federal regulations and the certification made that such regulations would not have a

significant economic impact upon a substantial number of small entities. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

#### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.- based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

### Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that a portion of the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

List of Subjects in 30 CFR Part 946

Intergovernmental relations, Surface mining, Underground mining.

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Thomas D. Shope, Regional Director  
Appalachian Region

\_July 21, 2011\_\_\_\_  
Date

Editor's note: This document was received by the Office of the Federal Register on  
May 23, 2012.

For the reasons set out in the preamble, 30 CFR Part 946 is amended as set forth below:

## PART 946 - VIRGINIA

1. The authority citation for part 946 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

2. Section 946.15 is amended in the table by adding a new entry in chronological order by “Date of final publication” to read as follows:

§ 946.15      Approval of Virginia regulatory program amendments.

\*   \*   \*   \*   \*

Original amendment submission date	Date of final publication	Citation/description
***** <b>July 17, 2008</b>	** [ <u>Insert date of publication in the Federal Register</u> ]	4VAC 25-130-700.5, 4VAC25-130-761.11, 4VAC25-130-761.13, 4VAC25-130-761.16, 4VAC25-130-772.12, 4VAC 25-130-773.13, 4VAC 25-130-773.15, 4VAC 25-130-773.20(c)(3), 4VAC 25-130-773.21, 4VAC 25-130-774.12, 4VAC 25-130-774.17(a), 4VAC 25-130-778.13, 4VAC 25-130-778.14(c), 4VAC 25-130-800.52 (a) and (a)(5), 4VAC 25-130-801.12(c) and (d), 4VAC 25-130-801.13, 4VAC 25-130-840.14(c)(2), 4VAC 25-130-846.2.



[FR Doc. 2012-12933 Filed 05/25/2012 at 8:45 am; Publication Date: 05/29/2012]